United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7420

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

SOLOMON CATES, *et al.*,
Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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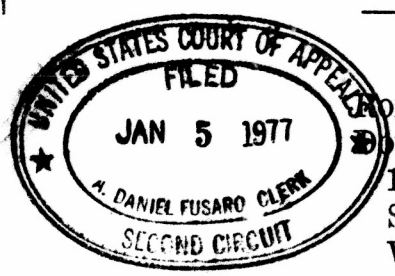
BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL



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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a voluntary, nonprofit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers and trade and industry associations

from throughout the United States. The principal goal of the EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the 1964 Civil Rights Act. As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, which require a determination of whether or not specific acts of discrimination which are time-barred under Title VII's statute of limitations may nevertheless form the basis for finding a later violation under the theory that the untimely violations have "continued" because their effects allegedly are perpetuated by a neutral date-of-hire seniority system.

FACTS AND DECISION BELOW

The facts of this case are set forth fully in the brief of the employer, Trans World Airlines (TWA), whose position this brief *amicus curiae* supports. Several key facts, and holdings of the district court, however, should be fully stressed.

Although the plaintiffs alleged that TWA once discriminated against them and members of their class by improper hiring policies, TWA suspended all hiring of persons in their job category for economic reasons in January 1970. No specific act of discrimination independent of those previous hiring

policies has been alleged.[1] The thrust of the plaintiffs' argument, therefore, is that the employer's previous discriminatory hiring policies resulted in their being hired later than they otherwise would have been. This in turn, they say, caused them to have been assigned a lower seniority slot under the date-of-hire seniority system in the employer's collective bargaining agreement.

Plaintiffs Cates and George alleged that they first applied for flight crew positions in February 1966, but repeatedly were rejected because of their race until they were hired in October, 1969. As a result of TWA's subsequent reduction in force, Cates and George were furloughed in September and October, 1970, pursuant to their place in the neutral seniority system. No charges were filed with the EEOC until March 24, 1972.

The third plaintiff, Whitehead, alleged that he was interested in working for TWA "as far back as 1957." Although he felt he was qualified at that time to be a flight deck crew member, he asserts he did not apply because he knew of TWA's allegedly discriminatory hiring policy of rejecting blacks. (13 FEP Cases at 203). Whitehead remained in the Air Force and did not apply to TWA until nine years later. On March 28, 1966, he applied to TWA for hire, and began work on May 5, 1967. Whitehead has never been furloughed or laid off, and presently works as a TWA pilot. His charge was filed with the EEOC

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[1] Indeed, as Judge Brieant pointed out in his decision below, the parties stipulated that plaintiffs would file a second amended complaint "omitting claims of current discrimination" by TWA. See *Cates* v. *TWA*, —— F. Supp. ——, 13 FEP Cases 201, 202 (S.D.N.Y. 1976).

on March 24, 1972, five years after he began work. Basically, Whitehead claims that he should be awarded the nine years additional seniority he would have had if he had applied to and had been hired by TWA in 1957.

The district court dismissed the plaintiffs' "refusal to hire" claims because they were filed with EEOC well after the alleged discriminatory acts, and long outside the filing period required by Title VII. The court rejected plaintiffs' assertion that the refusal to hire was a "continuing" violation which tolled the statute, and that there had been an ongoing series of violations with respect to the class (13 FEP Cases at 204).

On the other hand, the district court refused to reject on the merits the plaintiffs' contention that the company discriminated against them by awarding them seniority from their *date of hire*. Instead, the court ruled that a Title VII violation may be shown even under a neutral seniority system, if the individual can show he should have been hired early enough to accumulate sufficient seniority to withstand layoff.

The court then considered the point at which such a violation would occur for statute of limitations purposes. It concluded that when considering the constructive seniority claims, the unlawful employment practice in this case occurred on *the date the employee was laid off*. Under this approach, the court dismissed Cates' and George's seniority claims because neither had filed his EEOC charge within 180 days of his layoff.

Additionally, Whitehead's seniority claim was dismissed, but for a different reason. Whitehead had

not been laid off, and the court did not feel that the monthly allocation of seniority benefits under a neutral seniority system was an event by which an unlawful practice occurred for the purpose of activating the statute of limitations period. The court then held that (13 FEP Cases at 209):

> . . . Any detriments which he may have suffered during this period are not in and of themselves fresh acts of discrimination, but are only the *derivative effects* of the *prior* policies as carried forward by the seniority system. As a case like *Collins* makes clear, it is the unlawful *act* or *practice* and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC.
>
> As the Supreme Court recognized in an analogous context in the *Bowman* case, *Whitehead's real grievance is that due to TWA's discriminatory hiring policies he was not hired as early as he might have been.* But on and 180 days after July 2, 1965, the effective date of Title VII, he could have challenged those policies by filing charges with the EEOC. (Emphasis Added)[2]

The Equal Employment Advisory Council agrees with the district court that the refusal-to-hire allegations of Cates and George are time-barred because no EEOC charge was filed within 90 days of the specific hiring refusals. We also agree with Judge

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[2] Although not crucial to the case, it is submitted that the court meant to say that Whitehead should have filed his charge within 90 days of the effective date of the Act. As the court recognized (13 FEP Cases at 204, n. 2), the original period, which was 90 days, was extended to 180 days when the Act was amended in 1972.

Brieant's ruling that the "real grievance" underlying Whitehead's seniority claim was that he was not hired as early as he might have been but for the employer's previous hiring policies, and that these policies could have been challenged within 90 days of the effective date of Title VII. The EEAC contends, however, that the logic of these rulings as to Whitehead also extends to the seniority claims of Cates and George, as they are nothing more than attempts to resurrect claims previously barred by the statute of limitations of Title VII.

It is the contention of the EEAC that the court below wrongly accepted allegations that there were "*two* distinct unlawful employment practices" (13 FEP Cases at 204, emphasis added), *viz.*, the refusal to hire, *and* the application of the neutral seniority system. The application of the neutral seniority system was of itself perfectly proper, and can be attacked, if at all, only by reference to a previously time-barred act of alleged discrimination. Plaintiffs' theory is unsupported by existing Title VII precedent, and has been rejected by analogous decisions under the National Labor Relations Act, which have not been addressed either by the plaintiffs or the court below. See e.g., *Local Lodge No. 1424, Int'l Ass'n of Machinists, AFL-CIO, et al. v. N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411 (1955), ~~cited with approval in *Bryan Mfg., supra* (362 U.S. at 421-422)~~. (See the discussion, *infra*, pp. 21-26).

ARGUMENT

I. THE CONTINUING VIOLATION THEORY DOES NOT APPLY TO THE PLAINTIFFS' REFUSAL-TO-HIRE CHARGES AGAINST TWA.

Title VII contains its own statute of limitations in Section 706(e), (42 U.S.C. § 2000e-5(e)) which reads in pertinent part:

> A charge under this section shall be filed *within one hundred and eigthy days after the alleged unlawful employment practice occurred* . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved *within three hundred days after the alleged unlawful employment practice occurred*, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. (Emphasis added).[3]

The importance of complying with the limitations period contained in this section is well accepted, with

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[3] Although the second amended complaint did not so allege, TWA assumed, for purposes of its dismissal motion, that the Plaintiffs-Appellants initially filed charges with the New York State Division of Human Rights, entitling them to the 300-day limitation period. The district court held, that since there were no allegations of deferral, the 180 day period was applicable. (13 FEP Cases at 203, n. 2).

the courts holding that the timely filing of a Title VII charge is a jurisdictional prerequisite to instituting a civil action under that statute. See e.g., *IUE, Local 790* v. *Robbins & Meyers, Inc.*, U.S. Sup. Ct. No. 75-1264, decided December 20, 1976; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798, 5 FEP Cases 965, 967 (1973); *Smith* v. *OEO for Arkansas*, —— F.2d ——, 13 FEP Cases 131 (8th Cir. 1976).

The courts have held consistently that a specific, final refusal-to-hire does not constitute a "continuing" violation under Title VII. See *Molybdenum Corp.* v. *EEOC*, 457 F.2d 935, 4 FEP Cases 522 (10th Cir. 1972); *Smith* v. *OEO for Arkansas, supra*, —— F.Supp. ——, 13 FEP Cases 130 (W.D. Ark. 1975); Cf. *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. 515, 5 FEP Cases 725, 726 (S.D.N.Y. 1973). A similar construction has been given to the limitations periods of the National Labor Relations Act,[4] and the Age Discrimination in Employment Act of 1967 (ADEA).[5]

Repeatedly, court decisions have recognized that employee complaints about specific employer actions alleged to violate Title VII must be filed within 180 days of the specific occurrence. Plaintiffs' arguments here that the "effects" of these instances of hiring discrimination "continue" or expand the Act's filing

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[4] 61 Stat. 136, 29 U.S.C. § 160(b). See e.g., *N.L.R.B.* v. *Shawnee Ind., Inc.*, 333 F.2d 221, 224 (10th Cir. 1964); *N.L.R.B.* v. *Textile Machine Works, Inc.*, 214 F.2d 929 (3rd Cir. 1954); *NLRB* v. *Potlatch Forests, Inc.*, 189 F.2d 82 (9th Cir. 1951).

[5] 29 U.S.C. § 621, *et seq.* See *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 8 FEP Cases 1, 4 (5th Cir. 1974); *Law* v. *United Airlines*, 519 F.2d 170, 12 FEP Cases 1084 (10th Cir. 1975).

period have not been accepted by the courts. Moreover, decisional law indicates that the statute's filing requirements apply to virtually every aspect of the employment relationship. Continuing violation allegations have been rejected not only with respect to alleged illegal hiring practices, but also those dealing with assertedly illegal demotions, transfers, job classifications, layoffs, forced resignations, early retirement, and discharges where the employer refuses to rehire the former employee.[6]

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[6] See as to:

Demotions. Gordon v. *Baker Protective Services, Inc.*, 358 F.Supp. 867, 5 FEP Cases 1179 (N.D. Ill. 1973).

Transfers. Guerra v. *Manchester Terminal Corp.*, 350 F. Supp. 529, 5 FEP Cases 181 (S.D. Tex. 1972), affirmed in part and reversed in part on other grounds in 498 F.2d 641, at n. 6, 8 FEP Cases 433 (5th Cir. 1974); *Loo* v. *Gerarge*, 374 F.Supp. 1338, 8 FEP Cases 31 (D. Haw. 1974); *Buckingham* v. *United Airlines*, 11 FEP Cases 344 (C.D. Cal. 1975) (dictum).

Layoffs. Tippett v. *Liggett & Meyers Tobacco Co.*, 402 F. Supp. 434, 11 FEP Cases 1294 (M.D.N.C. 1975); *Kennar* v. *North American Rockwell Corp.*, —— F.Supp. ——, 9 FEP Cases 8 (C.D. Cal. 1974).

Forced resignations. Tuck v. *McGraw-Hill, Inc.*, —— F.Supp. ——, 9 FEP Cases 94 (S.D.N.Y. 1974).

Early retirement. Hiscott v. *General Electric*, 521 F.2d 632, 11 FEP Cases 292 (6th Cir. 1975).

Discharge and refusal to rehire. Terry v. *Bridgeport Brass*, 519 F.2d 806, 808, 11 FEP Cases 628, 630 (7th Cir. 1975); *Davidson* v. *Tapley*, —— F.Supp. ——, 11 FEP Cases 573 (S.D.N.Y. 1975); *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 10 FEP Cases 27 (8th Cir. 1975); *Moore* v. *Bank of New Orleans*, —— F.Supp. ——, 12 FEP Cases 1567 (E.D. La. 1975); *Higginbottom* v. *Home Centers Inc.*, —— F.Supp. ——, 10 FEP Cases 1258 (N.D. Ohio 1975).

The *Amicus* EEAC contends that there are no "compelling" circumstances which "may" be sufficient to warrant a finding of "continuing" discrimination. in this case. See *Olson* v. *Rembrandt Printing Co.*, *supra*, 511 F.2d at 1233-1234, 10 FEP Cases at 27, citing *Richard* v. *McDonnell Douglas Corp.*, 469 F.2d 1249, 1253, 5 FEP Cases 251, 254 (8th Cir. 1972).

The "mere insertion of the word 'continuing' in a Title VII complaint does not convert an otherwise noncontinuing violation and is in no way binding on the courts." See *EEOC* v. *South Carolina National Bank*, —— F.Supp. ——, 12 FEP Cases 843, 845 (D.S.C. 1976) and cases there cited. The relevant governing principles were set forth in *Cisson* v. *Lockheed-Georgia Co.*, 392 F.Supp. 1176, 1182, 10 FEP Cases 309, 312-313 (N.D.Ga. 1975), where the court stated:

> In the instant case, plaintiff would have this court in effect adopt a rule which has uniformly been rejected elsewhere that the insertion of the word "continuing" in the EEOC complaint invariably excuses the untimely filing of that complaint. As noted above, a layoff or discharge does not give rise to a *per se* claim of continuing discrimination. This court recognizes the general rule that a layman should be given wide latitude in his efforts to envoke the processes provided by Title VII; strict, over-technical application of the procedural intricacies of the Act is not consistent with its remedial purposes. Conversely, when over-liberal interpretations of EEOC complaints would actually frustrate the intent of Title VII, such interpretations should be rejected. Thus, this court rejects the argu-

> ment espoused by plaintiff herein that whenever the term "continuing" is inserted in an EEOC complaint, the court and the EEOC should assume that the plaintiff actually desires to raise claims of discriminatory failure to rehire, repromote, or transfer, rather than the discharge or demotion claim actually asserted. Such a rule would permit the bypass of orderly EEOC procedures whenever a layoff or discharge occurs and *would completely frustrate the purpose of Title VII to foster conciliation by the parties rather than judicial confrontation.* (Emphasis added)

Cf. *King* v. *Seaboard Coast Line R.R.*, —— F.Supp. ——, 8 FEP Cases 339 (M.D.N.C. 1974).

Whenever the courts have relied on the "continuing" violation theory, they have required that there be an "ongoing" pattern and practice of discrimination against the plaintiff, or the class he seeks to represent. See *Kohn* v. *Royall, Koegel & Wells, supra*, 59 FRD at 518, 5 FEP Cases at 726. Accordingly, when, as here, past illegal hiring practices have been discontinued, and hiring for the affected job classification has stopped, the "continuing violation" theory has been rejected. See *Powell* v. *Southwestern Bell Telephone Co., supra*, 494 F.2d at 488-489 8 FEP Cases at 4.[7]

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[7] The facts of *Southwestern Bell* closely fit those of the case at bar, and the court's conclusions with respect to them are set forth below (494 F.2d at 489, 8 FEP Cases at 4):

> The complaint stated that "on or about February 6, 1970, and continuing to date (February 3, 1973), defendant *refused to employ plaintiff* Rosa Powell *because of her age. . . .*" Since all well pleaded allegations in a complaint are to be assumed true on a motion to dismiss, it is

An examination of several prominent cases where courts have accepted the "continuing" violation theory reveals that they are significantly *unlike* the facts presented here. For even though those cases sustained complaints which described the "present effects of past discrimination," the cases also demonstrate that the term "present effects" requires a showing that past discriminatory practices actually *continue* into the statutory filing period.

Thus, in *U.S.* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 3 FEP Cases 589 (2nd Cir. 1971), this Court found that past discrimination was extant in the employer's seniority system because a black employee who wished to transfer to a new job *still* was required to "forfeit all of the benefits of seniority

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urged that the purportedly "continuing" nature of the discrimination means that the 180 day notice requirement would not have begun to run. We hold that the alleged discrimination was *not of a "continuing" nature.* The affidavit of Dorothy E. Raney showed that *no one at all had been hired* as an operator at the Cleburne office of the Company between August 10, 1970 and the time the affidavit was taken, October 30, 1972. It is thus manifest that *even if appellant had been denied employment because of her age as late as the date when the last operator was hired, any denial subsequent to August 10, 1970 was not "because of her age", but because of a lack of job openings.* Since the actual notice of intent to file a private law-suit came on March 23, 1971, the 180 day requirement was unsatisfied. 180 days from August 10, 1970, as we calculate it, expired February 7, 1971. The cases cited by appellant in connection with "continuing discrimination" are *inapposite,* since they deal with overt, documented company policies *in full force and effect* at the time suit was brought [citations omitted]. (Emphasis added).

which he had accrued in his pretransfer position . . ." (446 F.2d at 656, 3 FEP Cases at 591, citing the district court below). Also, in *Macklin* v. *Spector Freight Systems Inc.*, 478 F.2d 979, 987, 5 FEP Cases 994, 999 (D.C. Cir. 1973), the court specifically stated that the continuing violation was grounded on an "alleged conspiracy to deny appellants over-the-road driver jobs because of their race *continuing at least up to and including the date the EEOC complaint was filed.*" (*Id.*, emphasis added). Likewise, in *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 828, 4 FEP Cases 454, 465 (7th Cir. 1972), the court refused to dismiss one of four allegations of continued violations, noting that if the single act alleged was "followed by *repeated* promotions of others in preference to the complainant" (*Id.* at 828) then a proper allegation had been made. The court remanded the case to the district court to determine if any such continuous discriminatory conduct had taken place within the 90 days prior to the filing of the charge. Similarly, in *Cox* v. *U.S. Gypsum Co.*, 409 F.2d 289, 290-291, 1 FEP Cases 715 (7th Cir. 1969), it was held that the "recent hiring of new help suggested discriminatory recalls" which extended into the statutory filing period.[8]

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[8] The inapplicability of these and other similarly distinguishable continuing violation cases is discussed in full in *Cisson* v. *Lockheed-Georgia Co., supra*, 392 F.Supp. at 1180-1183, 10 FEP Cases at 310-313. *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970), reversing, in part, 296 F.Supp. 1332, 1 FEP 590 Cases (N.D. Ga. 1968), cited by the *amicus EEOC*, is distinguishable on other grounds. There, the Fifth Circuit held that the filing of a grievance with the union tolled the statute of limitations. *Contra, IUE, Local 790* v. *Robbins & Myers, Inc.*, U.S. Sup.

Two other cases cited by the amicus Equal Employment Opportunity Commission (EEOC) are similarly inapplicable. In *Marquez* v. *Omaha District Sales Office, Ford Motor Co.*, 440 F.2d 1157, 1162, 3 FEP Cases 275, 276 (8th Cir. 1971), the plaintiff complained that, although qualified, he had not been promoted over the last fifteen years because of his national origin. But in addition, he alleged that on January 3, 1967, the company promoted another employee who allegedly was less experienced than he. Later that month, on January 24 (well within the limitations period), he filed his charge with the EEOC. In *Weise* v. *Syracuse University*, 522 F.2d 397, 10 FEP Cases 1331 (2nd Cir. 1975), this Court reversed the lower court's dismissal of a Title VII suit where the plaintiff charged discrimination "up to and including today." [9]

Ct. No. 75-1264, decided December 20, 1976. In so holding in *Culpepper*, the Fifth Circuit did not discuss the district court's rejection of the plaintiff's continuing violation theory.

[9] The same distinction renders inapplicable two other recent decisions of this court. See *Egelston* v. *State University College*, 535 F.2d 752, 12 FEP Cases 1484 (2nd Cir. 1976); and *Noble* v. *University of Rochester*, 535 F.2d 756, 12 FEP Cases 1487 (2nd Cir. 1976). In both cases, the district court dismissed the complaints because they had not been filed within 180 days of either the plaintiffs' contract cancellation (Egelston) or failure to receive a promotion (Noble). This court reversed because it did not feel the specific acts of discrimination had been completed before the statutory period had run. Egleston's discharge was not found to be complete when she received notice her contract had been cancelled, but rather either when she left the university, or when her replacement was hired. Similarly, the promotion complained of in *Noble* was not seen to have occurred until the male employee actually took command of his new job. The decisions also pointed out

Thus, the cases accepting continuous violation allegations are inapplicable to the plaintiffs' refusal-to-hire allegations against TWA. TWA discontinued hiring *any* persons into the relevant job category almost two years before any charges were filed—which was well outside the statutory period for filing a charge with the EEOC.

II. THE CONTINUING VIOLATION THEORY DOES NOT APPLY TO PLAINTIFFS' SENIORITY ALLEGATIONS BECAUSE THE SENIORITY SYSTEM IS NOT DISCRIMINATORY AND NO ACT OF DISCRIMINATION HAS OCCURRED WITHIN THE LIMITATIONS PERIOD.

Although the court below properly concluded that plaintiffs' refusal-to-hire claims were time-barred, it inconsistently refused to reject the contention that defendants' seniority system, although neutral, had the discriminatory effect of unlawfully carrying forward TWA's past discriminatory hiring practices, thus reviving plaintiffs' long-barred hiring claims.[10]

Under the plaintiffs' contention, a Title VII hiring claim can be found timely even though a past policy of hiring discrimination has ended and no charges

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that the complaints alleged that each university continued *to the present* its policy of excluding women from the jobs in question. The cases were then remanded for the plaintiffs to prove these assertions.

[10] As its authority for accepting plaintiffs' theory, the court cited only *ACHA* v. *Beame*, 530 F.2d 648, 12 FEP Cases 257 (2nd Cir. 1976), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 12 FEP Cases 549 (1976). As set forth fully in TWA's brief, and as argued below, pp. 19-20, the court's reliance on these authorities is misplaced.

were ever filed within 180 days of the termination of that policy. The only requirements left for a timely claim are that there be a present employment relationship and some collateral effects of the time-barred acts. This theory is directly contrary to the weight of relevant authority.[11]

In *Collins* v. *United Airlines*, 514 F.2d 594, 10 FEP Cases 728 (9th Cir. 1975), the Ninth Circuit dismissed charges filed by a stewardess who had been discharged, and not rehired, pursuant to United's then extant no-marriage policy. The court stated (514 F.2d at 596):

> We cannot accept Collins' argument that her continuing non-employment as a stewardess resulting from the alleged unlawful practice is it-

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[11] At the outset it should be noted that plaintiffs' theory not only is illogical, but also unfair, because it provides them statutory rights which are not accorded persons who were discriminated against but never hired. In the previous section, it was established that persons who are improperly refused hire must file their claims within the statutory period. The same is true of employees who are discriminatorily discharged. Only persons who are hired or rehired are permitted to file claims based upon previously time-barred conduct under the plaintiffs' theory. A theory which thus penalizes an employer who ends a past practice of discrimination and then hires a person previously denied hire, would be a disincentive to *voluntary* compliance with Title VII which, the Supreme Court has emphasized, is the "preferred means" for achieving the elimination of unlawful employment discrimination. See *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36, 44, 7 FEP Cases 81, 84 (1974). Accord *Evans* v. *United Airlines*, —— F.2d ——, 12 FEP Cases 289, 290, n. 5 (7th Cir. 1976) (*Evans I*). The present status of the *Evans I* decision is discussed below in n. 12.

> self a violation of the Act. *Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within the 90 days preceding the filing of charges before the EEOC.* Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.
>
> Nor can we accept Collins' further argument that United's denial of her request for reinstatement during the 90-day period preceding her filing of charges was a new and separate discriminatory act or somehow rendered the initial violation, if any, a continuing one. In this context, a request for reinstatement is wholly different from a new application for employment—it seeks to redress the original termination. (Emphasis added)

Thereafter, the Seventh Circuit ruled in *Evans* v. *United Airlines*, *supra* —— F.2d ——, 12 FEP Cases 288 (*Evans I*), that a stewardess who was discharged under a similar no-marriage rule, but then was subsequently *rehired*, did not make a timely claim when she asserted that United's date-of-hire seniority system discriminated against her by not crediting her with past seniority for her previous service. The court, relying heavily on *Collins*, stated (12 FEP Cases 290-291):

> Evans would have this Court find a present discrimination when the adverse effect of a past discrimination is still felt because of a current policy of the employer, even though such current policy is not discriminatory with respect to sex. This is congruent with the thesis that the Ninth Circuit specifically declined to accept in Collins

> when it stated that "the alleged unlawful act or practice—not merely its effects— . . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC" . . . United's seniority policy in itself is not discriminatory with respect to sex. *A policy which is neutral cannot be said to perpetuate past discriminations in the sense required to constitute a current violation of Title VII.* If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. *A suit based on that termination alone, however, would be barred* for failure to file a charge relating to the termination within the statutorily required period. (Emphasis added)[12]

In addition, predominant legal authority indicates that an employer does not violate Title VII because ancillary effects of time-barred discrimination are carried over by a neutral seniority system under which minorities or women "will be laid off before and recalled after certain whites who might not otherwise have had seniority had [the employer] not discriminated in hiring [previously]." See *Waters* v.

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[12] Subsequent to the Supreme Court's decision in *Franks* v. *Bowman*, *supra*, the *Evans* panel reconsidered its holding and found that the claim was *not* time-barred. The Ninth Circuit's *Collins* decision was ignored in *Evans II*. See *Evans* v. *United Airlines*, 534 F.2d 1247, 12 FEP Cases 1105 (7th Cir. 1976) (*Evans II*). The Supreme Court has granted certiorari in *Evans*, 45 USLW 3321 (Docket No. 76-333). The *amicus* EEAC has argued to the Supreme Court that *Evans I* properly states the law, and that the Seventh Circuit's reversal, based upon *Franks* was mistaken. See also below pp. 19-20.

Wisconsin Steel Works, 502 F.2d 1039, 8 FEP Cases 577, 583-584 (7th Cir. 1974), cited with approval in *Evans I; Jersey Central Power & Light Co.* v. *Local Union 327, etc.*, 508 F.2d 687, 9 FEP Cases 117, (3rd Cir. 1975), remanded for reconsideration in light of *Franks* v. *Bowman* in 424 U.S. 747, 12 FEP Cases 1335, reaffirmed —— F.2d ——, 13 FEP Cases 672 (3rd Cir. 1976); *Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41, 10 FEP Cases 1297 (5th Cir. 1975); *Turnow* v. *Eastern Airlines*, —— F.Supp. ——, 13 FEP Cases 1227 (D. N.J. 1976); *Alleman* v. *T.R.W. Inc.*, —— F. Supp. ——, 13 FEP Cases 986 (M.D. Pa. 1976). The above-cited cases indicate that a previously time-barred discriminatory hiring claim is not revived because one may, as a result, have been placed in a lower seniority position.

Plaintiffs' reliance on *Franks* v. *Bowman*, *supra*, 424 U.S. 747, has been treated thoroughly in TWA's brief to this Court. Several features which distinguish *Franks* from the instant case should be stressed, however. The statute of limitations issue was not involved in that case. Rather, in circumstances in which plaintiff had filed timely charges, the Supreme Court indicated that a *proven* act of discrimination may be remedied by retroactive seniority. This limited view of *Franks* was endorsed by the court in *Turnow* v. *Eastern Airlines, supra*, —— F.2d ——, 13 FEP Cases 1227 (D. NJ. 1976). As Judge Biunno pointed out (13 FEP Cases at 1228-1229):

> Plaintiff contends that the filing requirement has been satisfied because the violation is a continuing one in that the initial termination in 1969 and its concommitant loss of seniority have subjected her to loss of pay and other benefits. It

> is argued that the seniority system, while neutral on its face, has the effect of carrying forward Eastern's past discrimination into the present. Plaintiff relies heavily upon the Supreme Court's decision in Franks v. Bowman, 424 U.S. 747, 47 L.Ed.2d 444, 12 FEP Cases 549 (1976). Such reliance is misplaced.
>
> The Franks case deals with a very narrow issue, namely, the appropriateness of an award under § 706(g) of Title VII of retroactive seniority relief to persons discriminatorily refused employment and whether § 706(h) was a bar thereto. [*Franks*] *did not obviate the necessity of a timely filing as plaintiff seems to suggest.* (Emphasis added).

For a similar interpretation of *Franks* see *Alleman* v. *T.R.W., Inc., supra,* —— F.2d ——, 13 FEP Cases 986, 987, 988 (M.D. Pa. 1976).

ACHA v. *Beame, supra,* 530 F.2d 648, 12 FEP Cases 257 (2nd Cir. 1976) also does not apply here. There, the New York City Police Department undertook a policy of maintaining separate hiring lists for men and women with a hiring ratio of 4:1. This discriminatory policy continued up until the charge was filed by the plaintiffs who represented the class. Thus, the EEOC charge in *ACHA* was clearly timely.

Neither this court, nor the Supreme Court has ever ruled that lingering effects of a time-barred specific act of discrimination afford a basis for resurrecting an untimely charge. For, to do so would undercut the well-recognized purposes of a statute of limitations. (See discussion *infra,* pp. 24-25, n.15).

III. THE PLAINTIFFS' CONTINUING VIOLATION THEORY HAS BEEN REJECTED BY THE SUPREME COURT'S DECISION IN *BRYAN MANUFACTURING CO.*, AND IN OTHER ANALOGOUS COURT AND NLRB DECISIONS UNDER THE NATIONAL LABOR RELATIONS ACT.

There are several important decisions under the National Labor Relations Act that directly undercut the plaintiffs' assertions that their previously time-barred allegations of discriminatory hiring refusals may be relied upon to permit them to renew these allegations by attacking TWA's current application to them of its neutral and otherwise valid seniority system.

Title VII and the National Labor Relations Act contain similar 180-day limitations periods.[13] The most important court decision construing Section 10 (b) of the NLRA is *Local Lodge No. 1424, Int'l As'sn of Machinists, AFL-CIO, et al.* v. *N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411 (1960). There, the employer and union entered into a contract containing

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[13] Section 10(b) of the National Labor Relations Act, as amended (61 Stat 136, 29 U.S.C. § 160(b)) reads in pertinent part:

> "*Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

Analogous NLRA precedents are, of course, relevant in the Title VII context. See e.g. *Franks* v. *Bowman, supra,* 424 U.S. at 769-770, 12 FEP Cases at 557-558; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 10 FEP Cases 1181, 1188 (1975).

a union security clause at a time when the union did not represent a majority of the employees. Upon unfair labor practice charges filed 10 and 12 months after the contract's execution, the NLRB's General Counsel issued a complaint alleging that the "continued enforcement" of the contract over the preceding six months was an unfair labor practice. The Supreme Court rejected this assertion and ruled that since the complaint was based upon an unfair labor practice that was barred by the limitations period, "that event could not be utilized to infuse with illegality the otherwise legal union security clause or its enforcement." (362 U.S. at 415). Thus, the court stated (362 U.S. at 416):

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence to the admissibility of past awards, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that *where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice.* There the use of the earlier unfair labor prac-

> tice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (Emphasis added).

In holding that the General Counsel's complaint was time-barred, the Court stressed that, as here, the "collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution" (362 U.S. at 419).

The Court then indicated that its view was "lent support" (362 U.S. at 419) by previous decisions of the Board, one of which closely parallels the instant case, because it holds that an employee who claims he is improperly placed on a seniority list must file his charge within six months of the asserted improper placement or be barred from later suits.

Thus, in *Bowen Products Corp.*, 113 N.L.R.B. 731, 36 L.R.R.M. 1355 (1955),[14] the Board found that Section 10(b) barred a finding that a layoff of an employee on the basis of seniority, during an economic force reduction, was discriminatory, although the charge was filed within six months after the layoff. The only basis for holding the layoff unlawful would

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[14] The facts in *Bowen Products* are set forth at length in the Court's *Bryan Manufacturing* decision. (See 362 U.S. at 420, n. 12).

have been a finding that the employee had been discriminatorily placed at the bottom of the seniority list more than six months before the charge was filed. The Board rejected the argument that the seniority placement constituted a "continuing violation" (113 NLRB at 732). Noting that the contract's seniority provision was not under attack, the Board held that the charging party's seniority placement "was a fully consummated act at that time which immediately created an adverse substantive condition of employment which could have been remedied by filing charges within six months." (*Id.*). The Board also stated that (*Id.*):

> [t]o regard such an injury as a continuing unfair labor practice, because an otherwise lawful layoff subsequently resulted therefrom, would in effect render Section 10(b) meaningless. For under this theory, 10, 20, or more years after the original discrimination, the complainant, upon being otherwise *properly* denied a promotion, transfer, recall, vacation benefits, or other rights based on seniority, could maintain an action therefore by establishing the original discrimination and relating the subsequent action to it. . . . We are satisfied that this view comports with the congressional intent to Section 10(b) to preclude litigating stale unfair labor practices. As noted, a contrary view would require a respondent to collect evidence and find witnesses as to events occurring years before the filing of the charge. (Emphasis added)[15]

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[15] The Board's concern for judicial fair play expressed in *Bowen* was adopted by the Supreme Court in *Bryan*, where it was pointed out that the Section 10(b) limitations period was prompted by "complaint that people were being brought to

A like result was reached in *N.L.R.B.* v. *Houston Maritime Assn.*, 426 F.2d 584, 9 FEP Cases 336 (5th Cir. 1970). In that case, the court dismissed charges filed by black applicants who sought to register for referral through the union's exclusive hiring hall, but were rejected because the union was taking no new registrations because its hiring list was temporarily overloaded. The court reasoned that there were valid reasons for the cessation of registration. The court then observed that there had been no ra-

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book upon stale charges." 362 U.S. at 424, citing *N.L.R.B.* v. *Pennwoven, Inc.*, 194 F.2d 521, 524 (3rd Cir. 1952). The Legislative history of Section 10(b) revealed "[i]t had not been unusual for the Board, in the past, to issue complaints years after an unfair labor practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." *N.L.R.B.* v. *Pennwoven*, *supra*, 194 F.2d at 524, n.2. A similar Congressional purpose underlies the limitations period of Title VII and 42 U.S.C. § 1981. As stated by the Supreme Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-464, 10 FEP Cases 817, 821 (1975).

> Any period of limitation, including the one-year period specified by § 28-304, is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.

The Court also noted in *Johnson* that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying" an appropriate limitations period. (421 U.S. at 464, 10 FEP Cases at 821)

cially motivated refusals to register during that six months limitations period, and that the *maintenance* during the six-month period of an all-white pool of registrants did not violate the Act, even though the pool was created by racial discrimination prior to the six-month period, since there was no act of racial discrimination *within* the limitations period.[16]

The discriminatory act complained of by the plaintiffs here is that they were improperly denied hire at a remote time well outside the limitations period of Title VII. The plaintiffs' second amended complaint "omitt[ed] claims of current discrimination" by TWA (13 FEP Cases at 202). The employer's application of its neutral date-of-hire seniority system is alleged to be illegal only by way of plaintiffs' reliance on an earlier time-barred, allegedly illegal refusal-to-hire. This attempt to "infuse with illegality the otherwise legal [seniority] clause or its enforcement" (362 U.S. at 415) is improper, and should be rejected by this Court.

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[16] Similarly see *N.L.R.B.* v. *Textile Machine Works*, 214 F.2d 929, 932 (3rd Cir. 1954), and *N.L.R.B.* v. *McCready & Sons, Inc.*, 482 F.2d 872, 874-875 (6th Cir. 1973), both cited with approval in *Collins, supra*, 10 FEP Cases at 730. Accord: *N.L.R.B.* v. *Childs Co.*, 195 F.2d 617, 621, 623 (2nd Cir. 1952), cited with approval in *Bryan, supra*, 362 U.S. at 428; *N.L.R.B.* v. *Shawnee Industries, Inc., supra*, 333 F.2d 221, 224; and *Metropolitan Life Ins. Co.* v. *N.L.R.B.*, 371 F.2d 573 (6th Cir. 1967), reh. den., 371 F.2d 573.

CONCLUSION

For the reasons stated above, it is respectfully submitted that plaintiffs' refusal-to-hire and seniority claims are barred by the appropriate statute of limitations and should be dismissed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7420

SOLOMON CATES, et al.,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC., et al.,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Motion of the Equal Employment Advisory Council for Leave to File a Brief as Amicus Curiae, and two (2) copies of the Brief Amicus by mailing a copy of each in a properly addressed envelope in the United States Mail, postage prepaid, addressed as follows:

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